No. 92-487

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THE CITY OF SEATTLE, WILLIAM JUSTEN and JANE DOE JUSTEN, BEATRICE RYAN and JOHN DOE RYAN, HOLLY MILLER and JOHN GAYMAN, and OVID THOMPSON,
Petitioners,

v.

ROY W. and KATHLEEN ROBINSON, individually and as partners d/b/a COMPUTER SLIDE COMPANY, and that class of persons and entities similarly situated,
Respondents.

THE CITY OF SEATTLE, HOLLY MILLER and JOHN GAYMAN, OVID THOMPSON, DAVID MOSELEY and JANE DOE MOSELEY, BEATRICE RYAN and JOHN DOE RYAN,
Petitioners,

v.

SINTRA, INC., KEITH H. HAMACK and PATTY L. HAMACK, ARTHUR M. STANLEY and SUSAN S. STANLEY,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) May a land use ordinance that is found to be a reasonable means of achieving a legitimate public purpose, and does not effect a "taking," nevertheless be held to deprive landowners of property in violation of Fourteenth Amendment "substantive due process," on the ground that it is "unduly oppressive"?

(2) May a city be held liable in damages under 42 U.S.C. § 1983 for denying due process rights guaranteed by the Fourteenth Amendment because the city continued, after a land use ordinance had been held invalid by a state trial court and before any appellate ruling, to apply the ordinance to persons who were not parties to the trial court proceedings?

(3) Did city administrative employees violate a "clearly established" federal constitutional right, so as to lose qualified immunity under 42 U.S.C. § 1983, by continuing, after a land use ordinance had been held invalid by a state trial court and before any appellate ruling, to apply the ordinance, on advice of official counsel, to persons who were not parties to the trial court proceedings?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgments of the Supreme Court of the State of Washington in these cases.[1]

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[1] Pursuant to Rule 29.1 of the Rules of this Court, petitioners

OPINIONS BELOW

Robinson. The decision of the Washington Supreme Court is reported at 119 Wash. 2d 34, 830 P.2d 318 (1992), and is reproduced in the Appendix ("App.") at 1a-50a. The Order of the Washington Supreme Court retaining the direct appeal on the merits and transferring and consolidating the qualified immunity appeal with the direct appeal is unreported and is reproduced at App. 51a. The decisions of the Superior Court for King County, Washington are unreported and are reproduced at App. 55a-65a.

Sintra. The decision of the Washington Supreme Court in *Sintra* is reported at 119 Wash. 2d 1, 829 P.2d 765 (1992), and is reproduced at App. 69a-96a. The notice of appeal and ruling of the Washington Supreme Court accepting a direct appeal are unreported and are reproduced at App. 97a-98a. The decision of the Superior Court for King County, Washington is unreported and is reproduced at App. 100a.

JURISDICTION

The decisions of the Washington Supreme Court in both *Robinson* and *Sintra* were entered on May 14, 1992. Petitioners' motions for reconsideration in each case were denied on June 18, 1992 and June 17, 1992 respectively. The petition is therefore due on September 15, 1992. This court has jurisdiction under 28 U.S.C. § 1257(a) (1988).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

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state that the City of Seattle is a municipality and, as such, has no parent companies or subsidiaries. The other petitioners are all individuals and have no parent companies or subsidiaries.

> No State shall . . . deprive any person of life, liberty or property, without due process of law . . . .

42 U.S.C. § 1983 (1988) provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State . . . subjects, or causes to be subjected, any . . . person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . .

The first Seattle Housing Preservation Ordinance ("HPO I"), Ordinance 109220 (1980), formerly codified at Seattle Municipal Code ("SMC") Chapter 22.210, is reproduced at App. 136a-147a. HPO 1 was repealed and replaced by the second Housing Preservation Ordinance ("HPO II"), Ordinance 112342 (1985), also codified as SMC Chapter 22.210 and reproduced at App. 116a-135a.

STATEMENT

In these cases, the Washington Supreme court reversed summary judgments dismissing damage claims against petitioners, the City of Seattle and certain of its employees, under 42 U.S.C. § 1983. The court:

(1) ruled in both cases that Seattle's Housing Preservation Ordinance violated Fourteenth Amendment "substantive due process" rights of property owners because it was "unduly oppressive," even though the court acknowledged that the ordinance was reasonably necessary to accomplish a legitimate public purpose and did not find that the ordinance effected a "taking";

(2) ruled in both cases that the City and its employees could be liable under 42 U.S.C. § 1983 because they had continued, after plaintiffs in unrelated actions had obtained state trial court rulings declaring HPO provisions invalid and prohibiting their enforcement, to apply those provisions to persons who were not parties to those actions; and

(3) ruled in *Robinson* that City employees were not entitled to qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and subsequent cases because they continued to apply the HPO, on advice of the City Attorney, with knowledge of the state trial court rulings in unrelated actions; in *Sintra*, the court applied a similar immunity analysis but remanded to the trial court to determine the knowledge held by particular individuals.

A. Statement of Facts

1. *HPO I.* In 1980, the Seattle City Council responded to a critical decline in the rental housing stock by enacting a Housing Preservation Ordinance ("HPO I," App. 136a-147a). HPO I imposed a license fee on owners who demolished housing. The City could use these fees only to produce low-income housing. (Section 15, App. 146a). HPO I also required owners to relocate displaced tenants or to pay relocation assistance of up to $1000 per household, unless the tenant received other relocation benefits under state or federal law or was legally evicted (Sections 12, 13, App. 143a-145a).

In 1983 a building owner called San Telmo Associates sued the City in county Superior Court, claiming that HPO I was an unauthorized tax and violated

a state statute limiting development fees. In October 1983, the court entered a declaratory judgment of invalidity and a permanent injunction directing that "the Housing Demolition License fee provisions of the Housing Preservation Ordinance may not be enforced against San Telmo Associates or its heirs, successors, or assigns." (App. 106a, § 2). Seattle did not appeal this trial court ruling. The City Attorney advised petitioner William Justen, then director of the Department of Construction and Land Use ("DCLU"), that the Superior Court's ruling barred enforcement only against the named plaintiff and that the license fee requirements should be enforced against other persons.[2] Justen passed these instructions on to petitioner Ovid Thompson, the city employee with day to day responsibility for administering HPO I.

2. *HPO II.* In 1985 the City Council replaced HPO I with a new Housing Preservation Ordinance ("HPO II," App. 116a-135a). HPO II did not impose a license fee, but in certain cases it required an owner demolishing housing to replace a percentage of the housing or take specified equivalent action. HPO II also required an owner to relocate low-income tenants or pay relocation assistance of up to $2000 per household. (Section 10, App. 123a-124a).

HPO II offered administrative relief to owners who could not make "profitable use of the property" if the housing replacement requirements were strictly applied. (Section 13, App. 130a-132a). When an owner applied for relief, Petitioner David Moseley, director of the Department of Community Development ("DCD"), would report to DCLU on "the owner's

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[2] The DCLU Director is required by law to "charge such fees for licenses ... as may be provided by ordinance." SMC § 3.06.050. (App. 148a).

ability to make profitable use of [the] property if the housing replacement requirement is imposed." (App. 131a).

The same developer that had successfully challenged HPO I sued the City in Superior Court to invalidate the replacement housing provisions of HPO II under state law ("*San Telmo II*"). In July 1986, the court held that the housing replacement provisions of HPO II effectively imposed a tax in violation of state law and enjoined enforcement against the named plaintiffs.

The City appealed. The City Attorney advised petitioner Holly Miller, who had by then become Director of DCLU, that while the appeal was pending HPO II should be enforced against other persons. Miller so instructed Thompson. The Washington Supreme Court affirmed the trial court decision in April of 1987. *San Telmo Assocs. v. Seattle*, 108 Wash. 2d 20, 735 P.2d 673 (1987). On advice of the City Attorney, DCLU then immediately stopped enforcing the housing replacement provisions.

In 1986, a different plaintiff, R/L Associates, Inc., sued the City in Superior Court challenging the relocation assistance provisions of HPO II, which had not been at issue in the *San Telmo* cases. On December 7, 1987, the King County Superior Court issued a declaratory judgment that "the Tenant Relocation Assistance provisions . . . may not be enforced against plaintiffs, their heirs, successors, or assigns," and granted plaintiffs a permanent injunction against their enforcement. (App. 111a). The City appealed.

Petitioner Miller again followed the City Attorney's advice that the Superior Court order barred enforcement of the relocation assistance provisions only

against named parties and that the City could continue to enforce these provisions against non-parties. In March 1988, R/L Associates obtained a contempt order against the City, Miller, and Thompson for applying the relocation assistance provisions to other persons. (App. 114a). DCLU immediately ceased enforcement of those provisions. The Washington Supreme Court affirmed the trial court's original judgment on state law grounds, and the contempt judgment, in *R/L Associates, Inc. v. City of Seattle*, 113 Wash. 2d 402, 780 P.2d 838 (1989).[3] The City Council repealed HPO II in 1990.

B. Proceedings Below

1. *Trial Court.*

a. *Robinson.* On May 27, 1988 respondents Roy W. and Kathleen Robinson, d/b/a Computer Slide Company ("Robinson"), filed suit in county Superior Court against petitioner City and petitioners Justen, Ryan, Miller, and Thompson, on behalf of all property owners who had paid license fees or relocation assistance pursuant to either HPO I and II. The complaint made state law claims for refunds and also alleged that HPO I and II took property in violation of the Fifth and Fourteenth Amendments to the United States Constitution, and that the individuals named had

> maliciously, recklessly and/or wantonly violated the constitutional rights of the plaintiff and others similarly situated by willfully enforcing an ordinance unconstitutional on its

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[3] The trial court had also held that enforcement of the relocation assistance provisions violated the Takings and Due Process Clauses of the federal and state constitutions. The Washington Supreme Court reversed the substantive due process holding and did not reach the takings issue.

> face even after the ordinance had been declared invalid and/or continued enforcement had been permanently enjoined by judicial decree.

Respondents sought, *inter alia*, damages under 42 U.S.C. § 1983, including punitive damages against the individuals. The individual defendants asserted the defense of qualified immunity in their answer.

On March 30, 1989, the Superior Court granted the individual defendants' motion for summary judgment on qualified immunity grounds and dismissed the claims against the individuals. (App. 62a). Respondents appealed. On May 1, 1989, the trial court granted the City's motion for summary judgment on the remaining federal civil rights claims. (App. 59a). On January 30, 1990, the court granted summary judgment holding the City liable under state law for all fees paid by respondents within three years before the filing of the lawsuit (App. 57a); on February 28, 1990 the class was awarded judgment for $430,271.47, plus costs and statutory attorney fees, on the state law claims (App. 55a).

Respondents appealed the denial of their federal claims as well as certain state law issues, and the City appealed the award on the state law claims. The Washington Supreme Court accepted direct review of all issues.

b. *Sintra*. In 1986 respondent Sintra, Inc. applied for relief from the housing replacement provisions of HPO II in order to convert a dilapidated hotel formerly housing low-income tenants into a mini-warehouse. The request for relief was pending while *San Telmo II* was on appeal. The DCLU Director, upon recommendation of petitioner Moseley, waived the housing replacement requirement for so long as

Sintra used the property as a mini-warehouse. On Sintra's appeal, the Hearing Examiner ruled that a permanent exemption would exceed the relief necessary to accommodate reasonable development, and remanded to DCLU. Sintra did not appeal. The State Supreme Court then decided *San Telmo II*; DCLU stopped enforcing HPO II's replacement housing provisions; and Sintra received its permit approval without paying for any replacement housing.

On October 5, 1988, Sintra, Inc. sued the City and petitioners Ryan, Miller, Thompson and Moseley, alleging that enforcement of HPO II violated Sintra's federal civil rights, the state constitution, and various state statutes. Sintra sought compensatory and punitive damages and attorney's fees. The individual defendants raised the immunity defense in their answer. On February 28, 1990, the Superior Court granted summary judgment dismissing Sintra's claims. (App. 100a). Sintra appealed. The Washington Supreme Court accepted direct review and ordered that *Sintra* be argued as a companion case to *Robinson*. (App. 97a, 51a).

2. *Washington Supreme Court.* On May 14, 1992, the Washington Supreme Court, in separate opinions, reversed the trial court judgments and reinstated the § 1983 claims against both the City and its employees. (App. 1a, 69a).

a. *Robinson.* The court affirmed dismissal of all of the taking claims, because plaintiffs had offered no evidence that the HPO denied all economically viable use of the property regulated. The court then held that the HPO nevertheless violated the substantive due process component of the Fourteenth Amendment because it was "unduly oppressive." The court acknowledged that the HPO had a legitimate governmental purpose and that the means used were "rea-

sonably necessary" to achieve it. (App. 14a). However, citing its earlier decision in *Presbytery of Seattle v. King County*, 114 Wash. 2d 320, 787 P.2d 907, *cert. denied*, 111 S. Ct. 284 (1990), the Court held that substantive due process involves a third test: whether an ordinance is "unduly oppressive," an inquiry which "lodges wide discretion in the court and implies a balancing of the public's interest against those of the regulated landowner." (App. 11a). The court held

> the HPO to be an unduly oppressive, and thus unreasonable, regulation [that] therefore violated the rights of the Robinsons [*i.e.*, the entire class] to substantive due process . . . .
>
> . . . [Because] a substantive due process violation is a deprivation of a federal constitutional right, the Robinsons may also be entitled to seek a damages remedy under federal statutes [i.e., 42 U.S.C. § 1983].

(App. 15a-16a).

The court then tied damage recovery for the supposed substantive due process violation to an altogether different part of the facts: petitioners' continued enforcement of the HPO provisions after the trial court rulings in other cases declaring them invalid. It said,

> A land use decision denying substantive due process states a cause of action under section 1983 only if it is invidious or irrational, *see R/L Assocs.*, at 412, or arbitrary, *Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988).

(App. 20a-21a). The court then concluded that "a finder of fact could determine that the City acted arbitrarily and capriciously in repeatedly continuing enforcement of the HPO, rather than seeking to stay

the force or effect of rulings of invalidity and injunctions against enforcement." (App. 23a).

With respect to the individual petitioners, the court purported to apply the qualified immunity principles set forth in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and its progeny. The court acknowledged that the HPO did *not* violate a clearly established federal right, because ordinances similar to the HPO had been upheld in other states against substantive due process challenges. (App. 26a). Nonetheless, the court denied the individuals immunity because of their role in continued enforcement after the state court invalidation rulings. The court relied on a pre-*Harlow* case that neither applied the "clearly established" test nor involved substantive due process, but that categorically denied immunity to public officials violating an administrative order. (App. 27a).

The court rejected the contention that, having received clear advice from the City Attorney, a reasonable official could have believed that it was not unconstitutional to continue to apply the ordinances to non-parties to the *San Telmo* and *R/L* cases. Instead, the court stated that immunity must be determined "*without reference* to legal advice rendered by the prosecuting attorney," (App. 28a, emphasis in original), citing *Burns v. Reed*, 111 S. Ct. 1934, 1944 (1991), where this Court denied *absolute* immunity to a prosecutor giving legal advice but recognized that *qualified* immunity was still available to the prosecutor and those who followed his advice. The court therefore remanded all § 1983 claims for trial.

b. *Sintra*. The court repeated the due process balancing test employed in *Robinson* and held that "the oppressive nature of the [HPO] is itself violative

of due process." *Sintra* (App. 85a).[4] The court then reasoned that the City could be liable for money damages under § 1983 for "irrational" conduct because it offered only "conditional relief" to Sintra after the trial court in *San Telmo II* found the housing replacement provisions invalid under state law and enjoined enforcement against the plaintiffs in that action. (App. 88a).

The court rejected the City employees' arguments that qualified immunity applied because *Sintra* had not shown a violation of a clearly established federal right and because petitioners were non-lawyers following advice of counsel. Although the express language of the *San Telmo II* injunction prohibited enforcement only against the named plaintiffs, their heirs, successors and assigns, the court concluded that "a reasonable person should have known that enforcing the HPO in contravention of a court order prohibiting enforcement would constitute a denial of someone's rights." (App. 90a).

Petitioners sought reconsideration in both cases, emphasizing the conflict between the substantive due process and immunity tests applied and this Court's decisions. The court denied reconsideration in both cases.

REASONS FOR GRANTING THE PETITION

A. The Washington Supreme Court's Substantive Due Process Test for Land Use Legislation Conflicts With This Court's Precedents.

In these cases the Washington Supreme Court devised a federal constitutional right for landowners that would swallow the Takings Clause. It held that a

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[4] Only housing replacement, not relocation assistance, was at issue in *Sintra*. (App. 71a, n.1).

rationally based land use regulation that does not go so far as to effect a taking may nonetheless be unduly oppressive in violation of Fourteenth Amendment substantive due process and expose a city to damages under 42 U.S.C. § 1983. That holding conflicts with this Court's decisions; indeed, it is explicitly based on 19th Century dictum that this Court has long since repudiated.

In *Robinson*, the Washington Supreme Court rejected a facial takings challenge to the HPO, holding that "the ordinance did advance legitimate state interests" and that respondents could not show that they were deprived of all economically viable use of their property. (App. 14a). The court also found that the HPO employed "reasonable means" to achieve its public purpose. (App. 14a). Nonetheless, the court held that the HPO, on its face, violated respondents' Fourteenth Amendment right to substantive due process because the ordinance was "unduly oppressive."[5] The court stated that the Due Process Clause gives courts "wide discretion" to balance the "public's interest against those of the regulated landowner." *Robinson* (App. 11a), quoting the court's earlier decision in *Presbytery*, 114 Wash.2d at 331, 787 P.2d at 913.

The Washington court based this doctrine on a dictum in an ancient case of this Court, but it ignored

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[5] The Washington court clearly believed it was upholding federal constitutional rights. *See Michigan v. Long*, 463 U.S. 1032 (1983). The issue before it was whether the city could be liable under 42 U.S.C. § 1983, which of course applies only to the deprivation of federal rights. Earlier state cases cited in *Robinson* (App. 11a) for the "unduly oppressive" test relied on *Lawton v. Steele*, 152 U.S. 133 (1894) and *Goldblatt v. Hempstead*, 369 U.S. 590 (1962). *See Presbytery*, 114 Wash. 2d at 330 n.17, 787 P.2d at 913 n.17; *West Main Associates v. Bellevue*, 106 Wash. 2d 47, 52, 720 P.2d 782, 786 (1986).

the numerous more recent decisions establishing that "undue oppression" is not an independent ground for invalidating rationally based economic regulation. The earlier case is *Lawton v. Steele*, 152 U.S. 133 (1894)[6], which the court cited in *Sintra* (App. 85a). *Robinson* and earlier Washington cases that endorsed the "undue oppression" test relied heavily upon a law review article that erroneously concluded that "*Lawton v. Steele* remains a vigorous decision, in good standing in the Supreme Court . . ."[7]

This Court has long since explicitly rejected the "unduly oppressive" test on the ground that legislatures should determine the wisdom of economic regulation. In *Brotherhood of Locomotive Firemen v. Chicago, Rock Island and Pacific Railway Co.*, 393 U.S. 129, 143 (1968), the Court easily reversed a judgment based on *Lawton*:

> The railroads also argue that the statutes violate the Due Process Clause because they

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[6] The dictum is,

> To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

Id. at 137. Lawton applied this test to *uphold* the summary destruction of illegally placed fishing nets.

Certain state supreme courts have cited *Lawton* for its first two criteria and even recited this dictum, but have omitted the "unduly oppressive" phrase. *E.g.*, *State v. Hartog*, 440 N.W.2d 852, 857 (Iowa 1989) (upholding mandatory seat belt legislation); *People v. Poucher*, 247 N.W.2d 798, 799 (Mich. 1976) (upholding motorcycle helmet requirement).

[7] Stoebuck, *San Diego Gas: Problems, Pitfalls and a Better Way*, 25 J. Urb. and Contemp. L. 3, 20-21 (1983).

> are "unduly oppressive" and impose costs on the regulated industry that exceed the public benefits . . . we think, with all due deference to appellees and the District Court, that these contentions require no further consideration.

The *Rock Island* Court cited a line of cases from *Nebbia v. New York*, 291 U.S. 502 (1934), to *Ferguson v. Skrupa*, 372 U.S. 726 (1963). In *Ferguson*, the Court declared that it had abandoned "the use of the 'vague contours' of the Due Process Clause to nullify laws which a majority of the Court believed to be economically unwise," and that the Court does not "sit as a 'superlegislature to weigh the wisdom of legislation' ". *Id.* at 731.

Economic regulation violates due process only if it is arbitrary or irrational, a conclusion the state court expressly rejected here. In *Pension Benefit Guaranty Association v. Gray*, 467 U.S. 717, 729 (1984), this Court said:

> "It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that *the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.*"

(quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976); emphasis added). *See also Pennell v. San Jose*, 485 U.S. 1, 11 (1988), rejecting a due process challenge to rent control, because it was not shown to be "arbitrary, discriminatory, or demonstrably irrelevant to the policy the Legislature is free to adopt."[8] As the Court said unanimously last Term:

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[8] The Due Process Clause does *not* require the *substantial*

> . . . the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended. . . judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.

Collins v. Harker Heights, 112 S. Ct. 1061, 1068 (1992).

The courts of appeals have reached similar conclusions. For example, in *Gilbert v. Cambridge*, 932 F.2d 51, 65 (1st Cir.), *cert. denied*, 112 S. Ct. 192 (1991), the court upheld an ordinance restricting condominium conversions, stating: "a substantive due process challenge to municipal legislation of a social or economic nature 'asks only whether a *conceivable* rational relationship exists between the . . . ordinance and legitimate governmental ends'." (italics in original). *See also Midnight Sessions, Ltd. v. Philadelphia*, 945 F.2d 667, 682 (3rd Cir. 1991). In *Coniston Corp. v. Hoffman Estates*, 844 F.2d 461, 465 (7th Cir. 1988), the court rejected a claim that a land use decision violated substantive due process, saying: "The concept invests judges with an uncanalized discretion to invalidate federal and state legislation." The court held that a land use regulation "can be said to violate substantive due process only if it is irrational." *Id.* at 467.

Land use regulation is traditionally and properly evaluated under the Takings Clause. This Court has devoted considerable effort to defining the criteria for

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relationship that is required under some circumstances by the Takings Clause. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 n.3 (1987).

determining whether a regulation has gone "too far" and become a taking. Just last Term, the Court again recognized that "government may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate," when the regulation rationally furthers a state purpose and does not deny all beneficial use. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2897 (1992). The Washington court's approach would replace the regulatory taking doctrine with a roving inquiry into "undue oppression,"[9] and inhibit local legislatures, fearful of § 1983 liability, in the rational exercise of their police powers.

B. The Washington Supreme Court's Holding That a City and Its Employees May Be Liable for Damages Under 42 U.S.C. § 1983 for Continuing To Enforce an Ordinance After a State Trial Court Has Declared It Invalid Gives Wholly Inappropriate *Federal* Law Effect to State Trial Court Decisions.

In *Sintra*, the Washington Supreme Court held that a city and its employees could be liable for damages under § 1983 for "irrational" or "arbitrary" conduct because they continued to apply certain provisions of an ordinance to respondents after a state trial court had held the provisions invalid on state law grounds in an unrelated case and had enjoined the city from enforcing them against the plaintiffs in that case.[10]

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[9] The Washington court acknowledged as much: it said that it expects an increasing number of land use disputes; that in many cases its substantive due process analysis, rather than takings analysis, will apply; and that the result usually will turn on the "unduly oppressive" test. *Sintra*, App. 69a; *Robinson*, App. 14a.

[10] Neither the court's opinion in *Sintra* nor its opinion in *Robinson* makes clear what it thought was the relationship between (1) the supposed "undue oppressiveness" of the HPO and (ii)

The court reached essentially the same conclusion in *Robinson*.[11] If that were the law, officials would have to abandon enforcement after any adverse trial court ruling, even one on appeal in which they expected to win a reversal. They would be forced to appeal every trial court decision rather than settle or wait for a more important or better case to obtain a definitive decision.[12] In effect, there would be constitutionally mandated nonmutual collateral estoppel against the government.

But that is not the law. To the contrary, in *United States v. Mendoza*, 464 U.S. 154 (1984), this Court reversed an application of nonmutual collateral estoppel, holding that a federal agency was entitled to relitigate an issue decided by a district court. Moreover, the court of appeals decisions most nearly on point indicate that a state does *not* violate due process by enforcing statutory requirements against other persons after lower court rulings of invalidity. *See Ostrosky v. Alaska*, 913 F.2d 590 (9th Cir. 1990) (enforcement of fishing permit requirement while appealing a lower court ruling, in a criminal case involving the same defendant, that the permit statute was invalid). In *Lee v. Dugger*, 902 F.2d 822, 824 (11th Cir.

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the supposed arbitrariness of continued enforcement after the state trial court's rulings in separate proceedings. We read the Court as requiring *both* elements before there can be a damage remedy under § 1983, *Sintra* (App. 91a); *Robinson* (App. 15a-16a). In any event, both elements involve important errors of federal law.

[11] Some, but not all, of the *Robinson* plaintiffs' claims arose after a later state court ruling had also invalidated other HPO provisions on both state and federal grounds. *See* pp. 6-7 *supra* and n.14, *infra*.

[12] There may be numerous valid reasons not to appeal, including limited resources, small amounts in controversy, settlement, multiple bases for liability, or mootness.

1990) (per curiam), where the State Corrections Department imprisoned an inmate longer than a state appellate court's construction of a statute regarding "gain-time" would allow, the court stated that "the Department was entitled to attempt to persuade the same court that its prior decision was in error" and held the Corrections Secretary immune from liability under § 1983.[13] *See also* Coenen, *The Constitutional Case Against Intracircuit Nonacquiescence*, 75 Minn. L. Rev. 1339, 1371 (1991) ("even staunch critics of intracircuit nonacquiescence do not advocate forced acquiescence in district court decisions").

More generally, the Washington Court's decision construes § 1983 to federalize matters of purely state concern. It is particularly inappropriate to create a federal constitutional remedy for nonacquiescence in a state trial court decision when that decision is based solely on state law.[14] Section 1983 "does not provide a remedy for abuses that do not violate federal law," *Collins v. Harker Heights*, 117 S. Ct. at 1065. If an ordinance is invalid under state law, then state law, not § 1983, should provide the remedy for claims based on its enforcement. *See Chesterfield Dev. Corp. v. Chesterfield*, 963 F.2d 1102, 1105 (8th Cir. 1992) (no due process violation "even if the City had know-

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[13] A decision not to acquiesce in a lower court's interpretation is, of course, different from discriminatory enforcement; *cf. Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988) (city "single[d] out one individual to be treated discriminatorily" in violation of its own regulations and contrary to the city attorney's advice). Seattle is not accused of discriminatory conduct.

[14] The two *San Telmo* decisions were based solely on state law. The *R/L Associates* decision invoked federal grounds as well (one of which was later reversed and the other not reached on appeal). *See* p. 7, *supra*. However, the trial court order in *R/L Associates* was not issued until *after* Sintra's permit approval and after the claims of certain *Robinson* plaintiffs arose.

ingly enforced the invalid zoning ordinance in bad faith . . ."); *Chiplin Enter., Inc. v. City of Lebanon*, 712 F.2d 1524, 1528 (1st Cir. 1983) (even bad faith refusal to issue a building permit in violation of state law did not violate substantive due process, so as to give rise to § 1983 claim, when state remedies were available).[15]

The holding that nonacquiescence in a trial court ruling, on advice of counsel, may result in § 1983 liability, conflicts with the principle that wrongful administrative action does not violate due process unless "egregiously unacceptable, outrageous, or conscience-shocking," *Amsden v. Moran*, 904 F.2d 748, 754 (1st Cir. 1990). *See also Northpointe Plaza v. Rochester*, 465 N.W.2d 686, 691 (Minn. 1991) (no § 1983 claim based on denial of a land use permit where city's actions, although "at best, arbitrary", "did not rise to the level of 'egregious' and 'irrational' conduct required by the federal courts"); *Condor Corp. v. St. Paul*, 912 F.2d 215, 220 (8th Cir. 1990) (denial of permit for a heliport based on erroneous advice of city attorney failed to support a claim under federal law); *Midnight Sessions*, 945 F.2d at 683 (no due process violation unless "the City denied the applications due to some improper motive such as political motivation or racial animus").[16]

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[15] The *Chesterfield* court adopted the reasoning of a five-judge concurrence in *Lemke v. Cass County*, 846 F.2d 469, 472 (8th Cir. 1987) (en banc) (per curiam), stating that in local zoning and land-use cases, a § 1983 claim requires "truly irrational" conduct, such as applying an ordinance only to persons whose names begin with certain letters, and that it is not enough that conduct is in violation of state law.

[16] The *Robinson* and *Sintra* opinions sometimes imply that the City intentionally violated court orders. There is no basis whatever for that implication with respect to the two *San Telmo*

The *Robinson* respondents have received refunds of the fees they paid. Other state law remedies are available.[17] There is no need to expand dramatically the reach of § 1983.

C. The Washington Supreme Court's Test for Qualified Immunity Conflicts With This Court's Precedents.

The qualified immunity decisions below conflict with this Court's recent qualified immunity precedents. *Robinson* and *Sintra* denied qualified immunity to City of Seattle employees who, upon the advice of the City Attorney, applied HPO provisions to non-parties after trial court decisions invalidating those provisions. The Washington court misplaced the burden of proof, failed to require a showing that clearly established federal rights were violated, and misread a recent decision of this Court to require that it disregard petitioner's reliance on official legal advice.

Beginning with *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court has reformulated the qualified immunity doctrine, making it clear that qualified im-

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injunctions, both of which plainly prohibited enforcement only against named parties. (App. 106a, §§ 2-3, 109a-110a, §§ 2-3). With respect to the third case, *R/L Associates* (which as previously noted has no bearing on the claims of the *Sintra* plaintiffs and some of the *Robinson* plaintiffs, *see* n.14 *supra*), the record is clear that the City Attorney advised petitioners that the injunction protected only the named plaintiffs. That advice was later held in error, giving rise to claims for refunds and a contempt order under state law. In any event, such a misreading of the scope of a state court injunction does not justify a federal damage remedy.

[17] Washington law allows a property owner who has applied for a permit to recover damages if agency action is untimely, arbitrary or capricious; or if a final agency decision should reasonably have been known to have been unlawful. WASH. REV. CODE § 64.40.020(1). The Robinsons' claim under this statute was dismissed on summary judgment as untimely, and they did not appeal. Sintra's claim was dismissed and not appealed.

munity is based on "special policy concerns involved in suing government officials," *Wyatt v. Cole*, 112 S. Ct. 1827, 1833 (1992), and that its purpose is to prevent "the distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Harlow*, 457 U.S. at 816.

To achieve this purpose, qualified immunity is the norm; only in extraordinary cases should it be denied. *Harlow*, 457 U.S. at 807. Since *Davis v. Scherer*, 468 U.S. 183, 197 (1984), it has been clear that the plaintiff bears the burden to prove a violation of a *clearly established* federal right. *Robinson* and *Sintra* squarely conflict with *Davis* because in both cases the court permitted qualified immunity to be defeated without any such showing. *Robinson* cited only a pre-*Harlow* immunity case categorically denying qualified immunity to an official who violated an administrative order interfering with plaintiff's First Amendment rights, *Donovan v. Reinbold*, 433 F.2d 738, 744 (9th Cir. 1970), and a district court ruling that had been vacated on the ground that the court should have abstained from deciding § 1983 claims in a local land use matter, *Front Royal & Warren County Indus. Park Corp. v. Front Royal*, 708 F. Supp. 1477, 1483 (W.D. Va. 1989), *vacated*, 945 F.2d 760 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1477 (1992). (App. 27a and 29a n.5). *Sintra*, without citation to any authority, merely concluded that a "reasonable person should have known that enforcing the HPO in contravention of a court order prohibiting enforcement would constitute a denial of someone's rights." (App. 90a).

Continuing to apply HPO provisions to other persons after a state trial court has declared them invalid did not violate any federal rights at all, *see* Section B *supra*, much less any "clearly established" federal

rights. To violate clearly established federal rights, the violation must be apparent; where there is a legitimate question as to the state of the law, it cannot be said that the official's action violates clearly established law. *Mitchell v Forsyth*, 472 U.S. 511, 535 n. 12 (1985). The breadth of this doctrine is illustrated by *McBride v. Taylor*, 924 F.2d 386 (1st Cir. 1991), in which the court granted qualified immunity to Farmer's Home Administration officials who violated an injunction requiring notice of foreclosure, stating, "even if the defendants violated the *Coleman* injunction, conduct which we do not condone, their actions would not amount to a violation of a clearly established constitutional due process right." *Id.* at 391.

Moreover, immunity must be granted if a reasonable employee *could* have believed that his or her actions did not violate any federal right. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). Immunity is denied only if *no* reasonable public employee under the same circumstances could have reached that conclusion. Qualified immunity "gives ample room for mistaken judgments," and makes accommodation for "reasonable error" so that " 'officials [will] not err always on the side of caution' because they fear being sued." *Hunter v. Bryant*, 112 S. Ct. 534, 537 (1991), quoting *Davis*, 468 U.S. at 196. In *Hunter* this court said "the [trial] court should ask whether the [defendant officials] acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed . . . after the fact." 112 S. Ct. at 537.

In *Robinson* and *Sintra* the court ignored this second prong of the qualified immunity doctrine. It simply did not ask the key question—whether a reasonable official *could* have believed it would not violate respondents' federal rights to continue, upon

advice of counsel, to apply an ordinance after a state trial court had declared it invalid and had granted unrelated parties an injunction against its enforcement.[18]

The Washington Court instead stated that "qualified immunity does not extend to those officials who knowingly violate the law," equating knowledge of the *existence* of a court order with a "knowing" violation of the law (notwithstanding the City Attorney's advice as to the legal effect of the order) and wholly omitting to consider whether there was a knowing violation of *federal* law. (*Robinson*, App. 27a-29a).

In addition, the *Robinson* court read this court's opinion in *Burns v. Reed*, 111 S. Ct. 1934, 1944 (1991), to indicate that "*Harlow*['s] objective standard applies to police conduct *without reference* to legal advice rendered by the prosecuting attorney . . ." (App. 28a, emphasis in original). But that is wrong. *Burns* denied *absolute* immunity to a prosecutor but recognized that *qualified* immunity was still available to the prosecutor and those who followed his mistaken legal advice. Courts of appeals have made it clear that legal advice is pertinent to whether officials acted reasonably under the circumstances. In *Arnsberg v. United States*, the court granted qualified immunity to an I.R.S. agent executing an invalid material witness warrant, stating:

> It would be plainly unreasonable to rule that the [officials] must take issue with the considered judgment of an assistant United

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[18] This second prong of the qualified immunity analysis should also be decided on summary judgment, if possible. *Anderson*, 483 U.S. at 641, *Hunter*, 112 S. Ct. at 536; *Arnsberg v. United States*, 757 F.2d 971, 982 (9th Cir. 1984), *cert. denied*, 475 U.S. 1010 (1986).

> States Attorney and the federal magistrate. . . . it would also mean that lay officers must at their own risk second-guess the legal assessments of trained lawyers. The Constitution does not require that allocation of law enforcement duties.

757 F.2d at 981. *See Floyd v. Laws*, 929 F.2d 1390, 1394 (9th Cir. 1991) (upholding qualified immunity in light of reliance on prosecutor's advice regarding probable cause); *Los Angeles Police Protective League v. Gates*, 907 F.2d 879, 887-888 (9th Cir. 1990) (qualified immunity granted to police officer involved in unlawful employment decision after following city attorney's advice); *Ortiz v. Van Auken*, 887 F.2d 1366 (9th Cir. 1989) (qualified immunity granted to officer who sought legal advice and warrant before acting); *V-1 Oil Co. v. Wyoming Dept. of Env'l Quality*, 902 F.2d 1482, 1489 (10th Cir.), *cert. denied*, 111 S. Ct. 295 (1990) (environmental official granted immunity for warrantless search executed upon advice of counsel).

CONCLUSION

The petition for a writ of certiorari should be granted.

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